In the United States Circuit Court of Appeals

For The Ninth Circuit

M. G. HENRY,
Plaintiff in Error,
vs.
TACOMA RAILWAY & POWER COMPANY, a corporation,
Defendant in Error.

No. 2453

WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE.

This is an action at law, to recover damages for personal injuries. The jury found for the defendant and plaintiff brings error.

Briefly stated, the complaint shows that defendant is a street railway company, operating cars

at Tacoma. On April 6, 1911, as plaintiff was entering one of those cars, "with one hand grasping a handhold thereon, said car was, by and through the carelessness, negligence and incompetency of defendant's servants * * started forward with a sudden jerk," whereby plaintiff lost his footing and was swung against the side of the car, receiving the injuries of which he complains. The injuries are described with some detail, and it is then alleged that by reason of them plaintiff has lost the capacity for enjoying life; that the outward manifestations of his affliction attract the attention of the curious, make him an object of pity and ridicule, and subject him to humiliation, vexation and annoyance; and that he must continue so to suffer during the remainder of his life. It is further shown that at the time of the accident he was 42 years old, of robust health and strength, employed as a bond buyer at a salary of $100 a month, with a certainty of early advancement and increase of pay; that at that time he had an intimate knowledge of the business of buying and selling bonds, mortgages and other securities, and was possessed of special skill in that business; and at that time and since, "subject to the condition of his health," he had opportunities to engage in that business as a principal, with a certainty of profits greatly in excess of the salary above named. That by reason of his injuries he was unable to perform his work as he had previously done, and in consequence lost his employment on August 1, 1911. Since that date he has

been unable to hold any position, but has attempted to assist in the conduct of a business such as above mentioned, but that by reason of his rapidly failing health, caused by his injuries, he has been and will be unable to perform the duties necessarily devolving upon him in connection therewith, and, as a result of his condition, his personal efforts are unprofitable, and it will be impossible for him during the rest of his life to perform any labor or hold any employment, or conduct any business, or earn any money for himself and family. (Transcript, pp. 4-10.)

The answer of defendant admitted the accident, but denied the damages, and alleged that the accident was due to the heedlessness and carelessness of plaintiff in attempting to board a moving car. The affirmative matter of the answer was put in issue by the reply. (Transcript, pp. 14-19.)

A verdict was rendered in favor of the defendant, and judgment of dismissal was entered. (Transcript, pp. 20-22.) A petition for new trial was thereafter filed in due time, which, after consideration by the court, was denied on January 21, 1914. (Transcript, pp. 22-37.)

At the trial plaintiff testified that he had become a physical wreck in consequence of the injuries received at the time of the accident. (Transcript, pp. 38-40.) Experts gave testimony strongly tending to prove that as a result of the accident plaintiff was suffering from "cerebellar ataxia," (Tran-

script, p. 77), a disease "that interfered very materially with his walking and employing himself where the muscles were called into play." (Transcript, p. 75.) Dr. SNOKE testified that "he thought plaintiff would not recover; and would expect him to get worse, and that, within a few years, he would be unable to walk at all." (Transcript, p. 78.) And Dr. JAMES, who had treated the plaintiff ever since the injury, said he "had done everything he knew to do, but the patient had grown gradually worse; and, in his opinion, the time would come when plaintiff could not walk." (Transcript, p. 79.) There was much other testimony to the same effect.

The plaintiff testified that, at the time of the accident, he was in the employ of Carstens & Earles, buying bonds; and, because of his inability to perform the work resulting from his injuries, lost his position. (Transcript, p. 39.) OWEN A. ROWE, a witness called by plaintiff, testified that he was in charge of the mortgage department of that firm at the time of the accident; that at that time plaintiff was the bond buyer, going to different towns, bargaining for improvement bonds; that he was acquainted with the ability of plaintiff in that line; and thought he knew the qualities which go to make up a "good bond man." He was then asked by—

"Mr. ARNTSON: Will you state whether, in your opinion, prior to the accident, Mr. Henry was a good bond buyer?

Mr. OAKLEY: I object to that as calling for an opinion which is a conclusion.

Mr. ARNTSON: The witness has qualified as an expert, and that he is qualified to give an opinion as to Mr. Henry's ability in that regard.

The COURT: Objection sustained. There may be instances when such evidence is competent, but it occurs to the court that there are three or four ways to arrive at this—the wages he drew, and the length of his experience, and other ways of establishing this matter, without undertaking to make it the subject of expert opinion evidence. Exception allowed.

WITNESS: The plaintiff's experience in the buying and selling of bonds while with Carstens & Earles was very extensive.

Q. State, if you know, what success he made in dealing with bonds.

Mr. OAKLEY: I object to that on the ground that it is incompetent, irrelevant and immaterial.

The COURT: Objection sustained. Any answer he would give would be indefinite. Exception allowed.

Mr. ARNTSON: We offer to prove by this witness that Mr. Henry was a thoroughly competent bond man up to the time of the accident, and that he was very successful in the handling of large issues of bonds, running into hundreds of thousands of dollars.

Mr. OAKLEY: The complainant said that he was earning $100 a month in that business. There is no claim that he has lost a dollar by reason of being unable to perform that business. In fact, he is making more money today, or they would have shown it.

The COURT: Objection sustained. You ask a man if he was a very successful bond buyer. That might mean one thing to one man and an entirely different thing to another. It is too uncertain, in-

definite, general and misleading. Exception allowed." (Transcript, pp. 56-58.)

Four months after the accident, after losing his position with Carstens & Earles, plaintiff engaged with Mr. H. W. Pratt and another in investment banking, bonds and mortgages. (Transcript, p. 45.) In the course of the examination of Mr. ROWE on the stand, Mr. OAKLEY had made this statement in the presence of the jury,—

"There is no claim that he (plaintiff) has lost a dollar by reason of being unable to perform that business. *In fact, he is making more money today, or they would have shown it.* (Transcript, p. 58.)

After that, Mr. PRATT was called and testified that he had been associated with plaintiff in the investment banking business several years; that prior to the accident plaintiff was an unusually energetic man, physically and mentally; that since the accident plaintiff's health had been poor; that during the first few months of their association plaintiff accomplished "quite a little work;" that since then his efficiency had diminished; that "at present" it was small; that "the results accomplished by plaintiff are a small fraction of what he accomplished during the earlier days of his association with him; that plaintiff's greatest value to the firm was when he was able to act as an "outside man;" and that now, owing to his disability, plaintiff is valueless as an outside man; and that plaintiff's present interest in the business "is between 25

and 30%." (Transcript, pp. 66, 67.) He was then asked by—

"Mr. ARNTSON: Is that interest to continue?"

Counsel for defendant objected that "it is incompetent, irrelevant and immaterial." The objection was sustained by the court, and an exception allowed.

"Mr. ARNTSON: Please state whether or not Mr. Henry's physical condition is to result in a change in his connection with the firm?"

Defendant objected, the objection was sustained, and an exception allowed.

"Mr. ARNTSON: I offer to prove by this witness that, by reason of Mr. Henry's condition—his inability to do business and travel about as demanded by the business—matters have progressed to a point where they have had to carry Mr. Henry for some time, more as an act of charity than otherwise, and that the end has come, or will come within a short time, when he must sever his connection with this business. I offer to prove that as bearing upon the measure of damages as the result of his injury.

Mr. OAKLEY: I wish to save an exception to the remarks of counsel just made in reference to carrying the plaintiff here as a charitable act, and discontinuance with the firm, as calculated to prejudice the jury.

THE COURT: The objection is sustained, and the jury instructed to disregard the offer. There is nothing in this case to warrant the assumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far, it has been shown that he *carries others around on pleasure excursions himself.* Counsel must be careful, so, if you get a ver-

dict, it will stand, and not be continually fluttering around the border line of what is objectionable, in trying to get it in (in) one shape or another. It will be more likely to result to your prejudice than to do you good."

Whereupon plaintiff prayed an exception to the ruling and to the remarks of the court, which was allowed. Thereupon, the court further instructed the jury as follows:

"The remarks of the court are in a sense provoked by counsel. The remarks of the court would not ordinarily be justified, as you are the sole and exclusive judges of the facts in every case from the evidence. Counsel by his offer, *which he had no business to make*, in the form that he did—The court felt it *required some reprimand* to call his attention to the fact, so that he would not repeat it. And, therefore, the remark was made."

Whereupon plaintiff excepted, and such exception was allowed. (Transcript, pp. 67-69.)

The defendant called the conductor and motorman (Martin Mathieson and Albert Olson) who were on the car at the time of the accident, who gave testimony tending to support the allegations of the answer relating to negligence of plaintiff contributing to his injuries. (Transcript, pp. 79, 81.) Later plaintiff called in rebuttal one ROBERTS, who was also employed on the car at that time as a "student conductor." On cross-examination of this witness by counsel for defendant it was shown that upon entering the employment of defendant he had been required to sign a contract

(Defendant's Exhibit G) containing, among others, the following provisions:

"That he (the employe) will reimburse the employer for all damages or injuries to or caused by the street car he is operating, wherein said damage or injury is due to the negligence of the employe, and in the event that said damage or injury arises from the concurring negligence of one or more other employes, then this employe agrees to reimburse the employer his proportionate share of the same. * * * The employer * * * shall be the sole judge of the extent of the damages or injury done, and * * * also whose fault or negligence produced the same, and what the employe's proportionate share shall be in cases of concurring negligence of several employes." (Transcript, pp. 117-118, Defendant's Exhibit G.)

Later plaintiff recalled the witness Mathieson, when the following occurred:

"MR. ARNTSON: I show you defendant's Exhibit G, being form of agreement between the defendant and J. W. Roberts, and ask you whether you ever signed such a form as that?

MR. OAKLEY: I object to that. It was introduced simply for impeachment purposes of Roberts. It is not in rebuttal of anything introduced.

MR. HAMMOND: It is not rebuttal, but it is the first time we knew of such a thing. It is part of our cross-examination, for the purpose of showing, if we can, that this witness has a direct, positive interest in the result of this case.

THE COURT: Objection sustained. It is not rebuttal.

MR. HAMMOND: I don't think it is properly rebuttal; but I ask the privilege of calling the witness for further cross-examination in order to show

this. This is the first time it has come to our knowledge that the employes of defendant were bound in this way. It seems to me material, if we can, to show that this witness is bound, so far as the law can do it, to make good to the defendant any verdict that might be rendered in this case.

THE COURT: The motion is denied.

Whereupon plaintiff prayed an exception to the ruling, and the exception was allowed.

MR. HAMMOND: I will ask the same privilege as to the witness Olson, and ask leave to prove by him that he signed a similar contract.

THE COURT: Assuming that the same objection will be made?

MR. HAMMOND: Yes.

THE COURT: Objection sustained, motion denied, and exception allowed." (Transcript, pp. 90-91.)

SPECIFICATIONS OF ERROR.

I.

The court erred in refusing to permit the witness OWEN A. ROWE to answer the following question, viz.:

"Will you state whether, in your opinion, prior to this accident, Mr. Henry was a good bond buyer?" (Transcript, p. 57; Assignment II.)

II.

The court erred in excluding the testimony offered to be given by the witness OWEN A. ROWE to the effect that the plaintiff was a thoroughly competent bond man up to the time of the accident,

and that he was very successful in the handling of large issues of bonds, running into hundreds of thousands of dollars. (Transcript, p. 58; Assignment III.)

III.

The court erred in refusing to permit the witness H. P. PRATT to answer the following question, viz.:

"Is that interest to continue?" (Transcript, p. 67; Assignment V.)

IV.

The court erred in refusing to permit the witness, H. P. PRATT, to answer the following question, viz:

"State whether or not Mr. Henry's physical condition is to result in a change in his connection with the firm?" (Transcript, p. 67; Assignment VI.)

V.

The court erred in rejecting the testimony of the witness H. P. PRATT, offered by plaintiff, that, "by reason of plaintiff's condition—his inability to do business and to travel about as demanded by the business" of the firm of which plaintiff and the witness were members, "matters have progressed to a point where they," the other members of the firm, "have had to carry Mr. Henry for some time, more as an act of charity than otherwise, and that the end has come, or will come within a short time,

when he must sever his connection with" the business of the firm, as bearing upon the measure of damages resulting from said injuries. (Transcript, pp. 67, 68; Assignment VII.)

VI.

The court erred in instructing the jury in the course of the trial, in connection with the matters referred to in Specification No. V, above, as follows, viz.:

"There is nothing in this case to warrant the assumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far, it has been shown that he carried others around for pleasure excursions, himself. Counsel must be careful and not be continually fluttering around the border line of what is objectionable, in trying to get it in in one way or another." (Transcript, p. 68; Assignment VIII.)

VII.

The court erred in instructing the jury in the course of the trial, in connection with the matters referred to in Specifications Nos. V and VI, above set forth, as follows, viz.:

"The remarks of the court are in a sense provoked by the counsel. The remarks of the court would not ordinarily be justified, as you are the sole and exclusive judges of the facts in every case from the evidence. Counsel, by this offer, which he had no business to make in the form that he did—the court felt it required some reprimand to call his attention to the fact, so that he would not repeat it; and, therefore, the remark was made." (Transcript, p. 69; Assignment IX.)

VIII.

The court erred in refusing to permit the witness MARTIN MATHIESON to answer the following question, viz.:

"I show you defendant's Exhibit G, being a form of agreement between the defendant and J. W. Roberts, and ask you whether you ever signed such a form as that?" (Transcript, p. 90; Assignment X.)

IX.

The court erred in rejecting the plaintiff's offer to prove by the witness ALBERT OLSON that he had also signed the form of agreement contained in defendant's Exhibit G, and referred to in the foregoing Specification No. VIII. (Transcript, p. 91; Assignment XI.)

X.

The court erred in denying the plaintiff's petition for a new trial for the following causes materially affecting his substantial rights in said action, viz.: Errors in law occurring at the trial, and duly excepted to, as specified in the foregoing Specifications Nos. I, II, III, IV, V, VI, VII and VII, and each of them. (Transcript, pp. 23-26-36; Assignment XII.

ARGUMENT.

Specifications I., II. and X (Assignments of Error II., III. and XII.) are submitted without written argument.

III.

The court erred in refusing to permit the witness H. P. PRATT to answer the following question, viz.: "Is that interest to continue?" (See Transcript, p. 67; Assignment V.) This specification will be considered with the two following.

IV.

The court erred in refusing to permit said witness, H. P. PRATT, to answer the following question, to-wit:

"State whether or not Mr. Henry's physical condition is to result in a change in his connection with the firm?" (See Transcript, p. 67; Assignment VI.)

This specification will be discussed together with the following.

V.

The court erred in rejecting the offer of plaintiff to show that, in consequence of his injuries, he was about to lose his position in the firm of which he was a member. (See Transcript, pp. 121, 122; Assignment VII.)

At the time of the accident plaintiff was employed as a bond buyer at a salary of $100 a month,

and, by reason of his injuries, lost that position soon after. (Transcript, p. 39) Later, he became associated with Mr. H. P. Pratt in an investment business. (Transcript, pp. 45, 66) At the trial, counsel for defendant asserted in the presence of the jury that plaintiff was making more money "to-day" than $100 per month, "or they would have shown it." (Transcript, p. 58)

Later, Mr. Pratt was called, and testified that during the first few months of their association in business, plaintiff accomplished "quite a little work;" that since then his efficiency had diminished; that, at the time of the trial, the results accomplished by plaintiff were but a small fraction of what they had been at first; that his value to the firm was chiefly as an outside man; and that, owing to his disability, plaintiff was no longer valuable as such. (Transcript, pp. 66, 67) The witness was then asked whether plaintiff's interest in the business was to continue (Transcript, p. 67), as bearing not only upon the injury to his ability as a business man, as alleged in the complaint, but also the injury to his ability to earn any salary, as well as to refute the assertion of defendant's counsel above referred to. Upon objection of the defendant, the witness was not permitted to answer. Thereupon counsel, believing that the objection was to the form of the question, in that it was considered too broad, made the question more specific by asking the following question:

"State whether or not Mr. Henry's physical condition is to result in a change in his connection with

the firm?" (Transcript, p. 67) Counsel for defendant again objecting, the court sustained the objection, upon the ground, as stated, that the question was speculative. (Transcript, p. 67) Thereupon counsel for the plaintiff, still feeling that he might not have made his position clear to the court, by bringing it within the issues of the pleadings, in view of the former discussion upon the subject, made the following offer:

"I offer to prove by this witness that, by reason of Mr. Henry's condition—his inability to do business and travel about as demanded by the business—matters have progressed to a point where they have had to carry Mr. Henry for some time more as an act of charity than otherwise, and that the end has come, or will come shortly, when he must sever his connection with that business. I offer to prove that as bearing upon the measure of damages as the result of the injury." (Transcript, pp. 67, 68)

Defendant objected to the offer, whereupon the court said:

"The objection is sustained and the jury instructed to disregard the offer. There is nothing in this case to warrant the assumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far, it has been shown that he carries others around on pleasure excursions himself. Counsel must be careful, so, if you get a verdict, it will stand, and not be continually fluttering around the border line of what is objectionable, in trying to get it in in one shape or another. It will be more likely to result to your prejudice than to do you good." (Transcript, p. 68)

We submit this ruling was erroneous, and the remarks of the court of a character to prejudice plain-

tiff's case. The remarks of the court are made the subject of the following specifications.

It was alleged in the complaint and put in issue by the answer that, since August 1, 1911, plaintiff had been unable to hold any position; that he had attempted to assist in the conduct of an investment business, but, by reason of his "rapidly failing health caused by said injuries," he has been and will be unable to perform the duties necessarily devolving upon him in connection with such business; and that, as a result, his personal efforts are unprofitable, and that it would be impossible, during the balance of his lifetime, for him to conduct any business or earn any money. More than this, as already shown, counsel for defendant had aggressively asserted before the jury that, at the time the offer was made, plaintiff was making more money than he had made before the accident. Clearly, under such circumstances, plaintiff was entitled to prove the facts offered by him. If it were true that his associates were carrying him as an act of charity, in consequence of his injuries, and the time had come, or was about to arrive, when they would do so no longer, and he must leave the firm in which defendant was insisting he was earning more than $100 a month, common fairness required that he be permitted to show it. The result offered to be proven was the natural consequence of the injuries inflicted which defendant was bound to anticipate.

Nor were the objections stated by the court sufficient to justify the ruling. The court seems to have thought something had been assumed by the offer,

whereas nothing was assumed. The offer was to prove the fact that plaintiff was being carried as an act of charity, and was about to lose his position in the firm; in other words, that his usefulness was at an end, and his earning power destroyed.

The declaration of the court that the evidence so far had shown that plaintiff was himself performing acts of charity, rather than that charity was being done to him, was uncalled for and highly prejudicial to plaintiff. If it were true that plaintiff had carried others on pleasure excursions, such fact would have no tendency to negative the facts offered to be proven, while the subsequent remarks of the court could serve no purpose other than to place counsel for plaintiff in an undesirable light before the jury. See—

Peterson v. Pittsburg, etc., Min. Co., 140 Pac. Rep., 519.

VI. and VII.

The court erred in its remarks and instructions to the jury, as set forth in Specifications VI. and VII. (See Transcript, pp. 122, 123; Assignments of Error VIII. and IX.)

The subject matter of these specifications, and specification V., just discussed, are closely related, and all three might well have been considered together.

Following the remarks of the court quoted when considering Specification V., to-wit:

"There is nothing in this case to warrant the as-

sumption of anybody carrying Mr. Henry as an act of charity. From the evidence so far, it has been shown that he carries others around on pleasure excursions himself. Counsel must be careful, so, if you get a verdict, it will stand, and not be continually fluttering around the border line of what is objectionable, in trying to get it in in one shape or another. It will be more likely to result to your prejudice than to do you good." (Transcript, p 68) An exception having been taken to those remarks, the court continued:

"The remarks of the court are in a sense provoked by the counsel. The remarks of the court would not *ordinarily* be justified . . . Counsel, by his offer, *which he had no business to make* in the form that he did—the court felt it *required some reprimand* to call his attention to the fact, *so that he would not repeat it.* And therefore the remark was made." (Transcript, p. 69)

Even though the offered testimony be held inadmissible, as we believe it will not, we submit the remarks of the court in ruling upon the original offer and explaining those remarks were well calculated to prejudice plaintiff's case and prevent that fair trial of which all should be assured.

Briefly, the jury were told that counsel for plaintiff were shysters, who were continually trying to get before them improper testimony; that the offer just made constituted another attempt to get before them testimony to which plaintiff was not entitled; that counsel "had no business" to make the offer as they had made it, and that the court had deemed it necessary to administer a rebuke in order to put a stop to

such practices. And the language used might well be taken by the jury as an expression of doubt upon the part of the court that the plaintiff should recover a verdict. We believe this court will find nothing in the record to justify the idea that counsel for plaintiff acted in bad faith at any time during the trial. It was their duty to present to the jury every fact which, in their judgment, would tend to support plaintiff's case, and properly within the issues; and, in making the offer which called forth the rebuke of which complaint is here made, they believed and still believe they were acting in discharge of that duty. The questions previously asked of the witness did not suggest fully the answer expected; and, if plaintiff were to avail himself of his exception to the rulings of the court, it was necessary that he disclose precisely what he expected to prove.

1 Thompson on Trials, sec 678;
Pueblo v. Bradley, 128 Pac. Rep., 888;
Wright v. Chelsea, 93 N. E. Rep., 840;
Forquer v. North, 112 Pac. Rep., 439.

Hence, since counsel expected to prove what he had offered, it was proper to make the offer in the form it was made. But, whether we are correct in this or not, the remarks of the court were of such character and made under such circumstances as was likely to destroy the legitimate influence of counsel with the jury, and prejudice the cause of plaintiff.

As said in a recent case:

"While it is true that not every remark of the trial

court will constitute reversible error, where it is made with reference to the admissibility of evidence, yet there is nothing of which a *nisi prius* judge should be more careful than in his remarks or assertions made with reference to admitted or rejected testimony during the course of the trial. The average juror is a layman; the average layman looks with most profound respect to the presiding judge; and the jury is, as a rule, alert to any remark that will indicate favor or disfavor on the part of the judge. Human opinion is ofttimes formed upon circumstances meager and insignificant in their outward appearance; and the words and utterances of a trial judge, sitting with a jury in attendance, is liable, however well intentioned, to mould the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby."

Peterson v. Pittsburg, etc., Min. Co., 140 Pac. Rep., 521 (opin)

Or, as said in an earlier case:

"It is possible for a judge to deprive a party of a fair trial, without intending it, by his manner of trying the case; and, when it is apparent that a fair trial has not been had, the court of review should give relief for that cause as for any other."

Wheeler v. Wallace, 19 N. W. Rep., 33.

While the law on this subject is more fully stated in *Dalas C. Elec St. Ry. Co. v. McAllister,* 90 S. W. Rep., 936 (opinion)—

"An attorney at law is an officer of the court, and as such is under special obligation to be * * respectful in his conduct * * to the court or judge. He is also as such officer entitled to such treatment from the trial judge that the interest of his client will not be prejudiced. * * It must be conceded that

the *standing* and reputation *of counsel for fairness and honorable conduct and his real or apparent standing with the court has great weight with the jury* in determining the importance to be attached to the evidence introduced by such attorney, as well as his argument in discussing such evidence. *If the jury be of the opinion that counsel is a man who * * * would resort to questionable and dishonorable methods to gain an advantage, they would naturally expect the same conduct in the presentation of the evidence and in the argument of the case. As* stated * * in *McDuff v. Detroit Evening Journal,* 47 N. W. Rep., 671, 'Appellate courts must presume that one occupying so important a position as that of circuit judge can influence a jury. Whenever he expresses an opinion on any disputed fact, * * *or uses any language which tends to bring an attorney into contempt before the jury, he commits an error of law, for which the verdict and judgment must be promptly set aside.''*

And to the same effect, see:

Cronkhite v. Dickerson, 16 N. W. Rep., 371;
Williams v. West Bay City, 78 N.W. Rep., 371;
McIntosh v. McIntosh, 44 N. W. Rep., 593.
Nave v. McGrane, 113 Pac. Rep., 88;
Monier v. Phil. Rapid Trans. Co., 75 At. Rep., 1070.

When the court said to this jury that counsel for plaintiff had been "continually fluttering" about in efforts to get objectionable testimony before them; that they "had no business" to make the offer they had made; and that it had become necessary to *reprimand* counsel in order to put an end to such improper practices, clearly he used language tending to

bring counsel into contempt before that jury, and well calculated to bring about the verdict rendered in the case.

VIII. and IX.

The court erred in refusing to permit plaintiff to recall the witnesses Mathieson and Olson for further cross-examination for the purpose of showing their interest in the result of the action. (See Transcript, p. 123; Assignments X. and XI.)

It had been shown that the defendant's car, at the time of the accident, was in charge of the witnesses Mathieson, conductor; Olson, motorman, and one Roberts, "student conductor." The conductor and motorman were called and gave testimony on behalf of defendant, tending to support its claim that plaintiff had been injured while attempting to board a moving car. (Transcript, pp. 79, 81) Later, plaintiff called the student conductor in rebuttal. Cross-examined by counsel for defendant this witness admitted that he had signed defendant's Exhibit G preliminary to entering upon his employment with defendant. This contract contained, among other things, the following provisions:

"That the employe will reimburse the employer for all damages or injuries to or caused by the street car he is operating, wherein said damages or injury is due to the negligence of the employe, and in the event said damage or injury arises from the concurring negligence of one or more other employes, then this employe agrees to reimburse his employer his proportionate share of the same. * * The employer shall be the sole judge of the extent of the

damages and injury done, and * * also whose fault or negligence produced the same, and what the employe's proportionate share shall be in case of concurring negligence of several employes." (Transcript, pp. 117-118).

After that, plaintiff recalled the witness Mathieson, whereupon the following occurred:

Mr. ARNTSON: I show you defendants Exhibit G, being the form of agreement between the defendant and J. W. Roberts, and ask you whether you ever signed such a form as that?

Mr. OAKLEY: I object to that. It was introduced simply for impeachment purposes of Roberts. It is not rebuttal to anything introduced.

Mr. HAMMOND: It is not rebuttal, but it is the first time we knew of such a thing. It is part of our cross-examination, for the purpose of showing, if we can, that this witness has a direct, positive interest in the result of this case.

The COURT: The objection is sustained. It is not rebuttal.

Mr. HAMMOND: I don't think it is properly rebuttal; but I ask the privilege of calling the witness for further cross-examination in order to show this. This is the first time it has come to our knowledge that the employes of defendant were bound in this way. It seems to me material, if we can, to show that this witness is bound, so far as the law can do it, to make good to the defendant any verdict that might be rendered in this case.

The COURT: The motion is denied.

Whereupon an exception to the ruling was allowed plaintiff.

Mr. HAMMOND: I will ask the same privilege as to the witness Olson, and ask leave to prove by him that he signed a similar contract.

The COURT: Assuming that the same objection will be made?

Mr. HAMMOND: Yes.

The COURT: Objection sustained, motion denied, and exception allowed. (Transcript, pp. 90-91)

We contend that the court did not, in this instance, exercise that degree of judicial discretion and fairness required by law. The plaintiff was not bound to know the contents of secret contracts between the defendant and its employes, such as are shown in the Exhibit G, and, in fact, did not know that any such contract had been signed by any of the witnesses until just before the privilege of recalling them for cross-examination was asked by him; hence, no diligence reasonably to be expected of counsel could have enabled them to present the testimony sought sooner than was done. We submit, common fairness demanded that the privilege asked should have been granted; and the ruling complained of was error highly prejudicial to plaintiff's case.

See: Thompson on Trials, sec. 348.

We submit that under the circumstances here disclosed there could be and was no fair trial, and the judgment below should be reversed and a new trial granted.

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